

NEW JERSEY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Plaintiff,

v.

SAM S. RUSSO, individually, SAM S.
RUSSO, INC., and SUZIE Q. RUSSO, LLC,
d/b/a/ SUZIE Q. FARM,

Defendants.

SUPERIOR COURT OF NEW JERSEY
OCEAN COUNTY--LAW DIVISION

DOCKET NO. OCN-001974-19

CIVIL ACTION

**SECOND SUPPLEMENTAL BRIEF ON BEHALF OF DEFENDANT SAM S. RUSSO
D/B/A/ SUZIE Q. FARM AND SAM S. RUSSO, INC. IN OPPOSITION TO THE ORDER
TO SHOW CAUSE SEEKING PRELIMINARY INJUNCTIVE RELIEF FILED ON
BEHALF OF PLAINTIFF NEW JERSEY DEPARTMENT OF ENVIRONMENTAL
PROTECTION**

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Defendants, improperly captioned as Sam Russo, Sam S. Russo, Inc. and Suzie Q. Russo, LLC d/b/a Suzie Q. Farm, submit this supplemental opposition to the Order to Show Cause filed by Plaintiff New Jersey Department of Environmental Protection (“NJDEP”) in response to NJDEP’s latest submission dated October 17, 2019. In that submission NJDEP asks this Court to preliminarily enjoin “all incoming loads of fill dirt, concrete, asphalt millings, food waste, woodchips, leaves, and grass clippings.” The premise for this extraordinary unwarranted relief is an unfounded claim by NJDEP “[t]he sampling results described here confirm that some incoming loads of fill materials are contaminated with hazardous substances.” The sampling results, however, do not in any shape or form demonstrate any such things, and are certainly not of the kind to warrant the granting of preliminary injunctive relief. The granting of such relief would cause the complete cessation of the farming operations with approximately one hundred sixty (160) head of cattle and one hundred (100) pigs.

What is necessary here is to pull this Order to Show Cause back to a sense of reality to how NJDEP originally premised its claims, which as demonstrated by all the test pits, soil borings, and samples obtained by NJDEP, were and continue to be overblown beyond belief. The following is from the first paragraph of NJDEP’s Preliminary Statement in its original brief:

Sam Russo and two companies he controls – Suzie Q. Farm and Sam S. Russo, Inc. – **are running an unpermitted, commercial scale solid waste facility** on Russo’s 94-acre property in Plumsted Township...Most of this material remains on Russo’s property, buried or bulldozed into massive, ever-growing piles. (NJDEP Brief at 1)(emphasis added).

So, initially, NJDEP came before this Court demanding the Court immediately shut down all further deliveries to the farm because Defendants are “running an unpermitted, commercial scale solid waste facility” and burying or bulldozing all of the material delivered to the farm. Following the entry into an Order on Consent on August 21, 2019, NJDEP dug test pits and

performed soil borings on September 9 and 10. And, as pointed out in Defendants' submission dated September 24, 2019, during their site investigation on September 10 and 11, NJDEP was given carte blanche to excavate and sample wherever they wanted. There were no limitations placed on where they could excavate, the number of excavations, or the number of samples they could obtain. And, what did they come up with? Nothing but some fragments of recycled crushed aggregate and asphalt millings in the roadways at the farm, and woodchips, which are a generally accepted bedding material for livestock, and part of Defendant's Free Range Open Lot Livestock Program reviewed and approved by the NJDOA. (Supplemental Certification of Sam Russo ("Russo Supp. Cert."), Paras. 2, and Exhibit B). The claim by NJDEP Defendants are operating a "commercial scale solid waste facility," permitted or unpermitted, were shown to be laughable.

Given the failure of NJDEP to demonstrate in any manner Defendants are operating an "unpermitted commercial scale solid waste facility," to justify NJDEP's demand for preliminary injunctive relief, NJDEP has moved the goalposts to claim the sampling results from the soil borings and stream sampling demonstrate irreparable harm justifying the granting of preliminary injunctive relief to shut down the farm. Again, NJDEP's claims are extraordinarily overblown.

We are now in the realm of a dispute over farm practices approved by the New Jersey Department of Agriculture ("NJDOA") that NJDEP now seeks to use as a basis for its demand for what is in effect permanent injunctive relief. Without questions these issues are inappropriate for an Order to Show Cause and need to be fully fleshed out through discovery, and if necessary, trial.

A. Soil Samples

First, it must be pointed out that in the Orders on Consent dated August 21, 2019 and September 27, 2019, NJDEP was ordered to provide the Court with its sampling results within two (2) business days of receipt. NJDEP received the sampling results on October 7, 2019, and forwarded them to counsel for Defendants that same day. To this day, however, NJDEP still has not submitted its full sampling results to the Court, instead cherry-picking a select few results out of the total sample analyses obtained by NJDEP. And, the reason is demonstrably clear why NJDEP has cherry-picked what results to submit. All of the other sample results came up as non-detect, meaning the contaminant was not found at the property.

Lawrence Brunt, a Principal Engineer with Arcadis US, Inc., with forty-two (42) years of experience reviewing thousands of laboratory reports and performing inspections and investigations at hundreds of contaminated sites, reviewed all of NJDEP's lab reports and determined the following:

NJDEP collected soil samples from nine borings installed across the site. 9 soil samples were collected from 8 locations and submitted to a certified laboratory for analysis for target analyte list (TAL) metals (including mercury), semi-volatile organic compounds (base neutral compounds and acid extractables), polychlorinated biphenyls, and pesticides. The laboratory analyses for each sample included 23 metals, 85 semi-volatile organic compounds, 9 PCB Arochlors and 21 pesticides, for a total of 138 analytes per each sample. For the sampling event, 1,242 analytes were evaluated from the nine samples and of the 1,242 analytes only 5 analytes were detected above the NJDEP's most stringent Residential Direct Contact Soil Remediation Standards (RDSCRS), meaning that of all the samples analyzed 1,237 analytes were below the RDSCRS. [Certification of Lawrence G. Brunt ¶ 14].

So, what NJDEP does not inform the Court is that NJDEP had 1,242 analyses performed on the soil samples for hazardous substances, yet all NJDEP cherry-picked to inform the Court about of those 1,242 sample analyses were a total of five (5) sample results above residential soil

remediation standards. NJDEP conveniently left out the fact that 1,237 of the soil samples either came up as not being detected or below the most stringent residential soil remediation standards.

And, it is not as if those five (5) sample results were found in five (5) different sample locations. Rather, one result was from the location identified as DG-6 and the other results were from the location identified as DG-8. Based on the fact 1,237 of the 1,242 analyses were either not detected or were below the most stringent soil residential remediation standards and of the five sample results, they were found only at two discrete locations. Clearly, there is no widespread contamination at the property and it is outrageous for NJDEP to claim these sample results support the imposition of injunctive relief.

Further, NJDEP mischaracterizes the relevant sample result standards for the Court's consideration. Again, what NJDEP does not tell the Court is that the soil remediation standards NJDEP is using to compare the results for the Court are what are termed "residential" soil remediation standards. The property that is the subject of this litigation, however, is not subject to "residential" soil remediation standards. Rather, given that the property is a farm, and no one resides on the farm, the appropriate standard for comparison are the "non-residential" soil remediation standards. "Residential" and "non-residential" soil remediation standards are defined at N.J.A.C. 7:26D-1.5 as follows:

"Residential direct contact soil remediation standard" means a soil remediation standard for the ingestion-dermal and inhalation exposure pathways established or developed pursuant to this chapter that is designed to protect human health at residential use sites, schools (pre-K-12) and childcare centers.

"Residential use" means a land use scenario based on exposure to contaminated media for 24 hours a day, 350 days a year for 30 years by children and adults living on a site.

"Non-residential use" means an exposure assumption based on exposure of adult outdoor workers to contaminated media during an eight-hour work day, 225 days a year, for 25 years.

"Non-residential direct contact soil remediation standard" means a soil remediation standard for the ingestion-dermal and inhalation exposure pathways established or developed pursuant to this chapter that is designed to protect human health at non-residential use sites.

As the Court can see, "residential" soil remediation standards are inapplicable to the farm given that no one is living on the farm, and it is not used for schools or childcare centers. Therefore, the appropriate standard NJDEP should have used for comparison, but did not, were the non-residential soil remediation standards and it was disingenuous for the NJDEP to use the residential soil remediation standards for comparison by the Court.

Based on the unambiguous definitions above the appropriate standard NJDEP should have used were the non-residential soil remediation standards. The non-residential soil remediation standard for the three (3) hazardous substances NJDEP identified in its brief at page 4 are as follows:

<u>Location</u>	<u>Compound</u>	<u>Non-Residential Standard (PPM)</u>	<u>Result</u>
DG-6	PCBs (Aroclors)	1	.277
DG-8	PCBs (Aroclors)	1	1.7
	Dieldrin	.2	.062
	Aldrin	.2	.074

Based on the above, had the NJDEP used the appropriate non-residential soil remediation standards, there would have been only one (1) result above that standard, being a PCB sample at 1.7 ppm at DG-8 twenty (20) to twenty-four (24) feet below the surface. The other PCB result at DG-6 and Dieldrin and Aldrin at DG-8 are all below the non-residential soil remediation standard. It is evident the NJDEP misled the Court with the residential soil remediation

standards because of the paucity of contaminants found at the farm after 1,242 sample analyses were performed by NJDEP.

This disingenuous attempt to buttress the miniscule amount of contaminants found at the property are further demonstrated by Exhibit B to the First Supplemental Certification of Thomas Farrell dated October 16, 2019. Exhibit B is a table of sample results at the farm for pesticides and PCBs, all of which, as NJDEP admits, are below the most stringent residential soil remediation standards. Given the results are below the most stringent residential soil remediation standards Defendants would not have to take any action whatsoever to address those contaminants. Yet, because NJDEP is so lacking in sample results above even residential soil remediation standards, which is not even applicable to this property, to support their demand for injunctive relief NJDEP has submitted this meaningless data to the Court to make it seem as if this property is highly contaminated and must be shut down.

Further, while Defendants acknowledge there is a PCB sampling result at DG-8 above the non-residential soil remediation standard, the issue of where the PCB originated from is very much in dispute, as set forth in the Second Supplemental Certification of Sam Russo, where Mr. Russo explains the history of the property and specifically the location of the DG-8 sample. In his Certification Mr. Russo states as follows:

3. In their papers NJDEP refers to sample location DG-8 at a depth taken between 20-24 feet. This sample was taken from under my topsoil pile, which NJDEP refers to as a fill pile. To be clear, I have never taken in any dirt and placed it into the topsoil pile.

4. When I bought the farm in 1998, the property was full of mounds of debris and other material. The farm was previously owned by Andy Nemeth and he had been accepting ground up material from an individual by the name of Joseph Pescatore, who went to prison for illegal dumping on the property. Prior to that the property was used for farming.

5. When I purchased the property there were multiple mounds of material on the property, with at least some forty (40) feet in height. I spent approximately \$100,000 in disposal fees for removal of the material and mounds from the property.

6. Some of these mounds were in the area of where NJDEP took the sample referred to as DG-8, which is now under the topsoil mound.

7. At the time of the dumping and prosecution of Joseph Pescatore NJDEP was aware of this dumping. I am fully aware of this because William Everett, who has since retired from the NJDEP, discussed this with me when he was still with NJDEP and conducting inspections of my property.

8. In their papers NJDEP implies I put dirt in this area that I received from "shady operators" from North Jersey. Not one load of dirt from these operators has ever gone into that location or any other location at the property while owned by me. Simply put, I have only accepted soil from reputable parties, and certainly never "shady operators." NJDEP is fully aware of the companies that send me soil.

9. When I initially started the topsoil mound it was from topsoil I had taken from lot clearings in the Ocean County area for which I had the job of clearing the lots. The lots consisted of virgin land with trees. I would remove the trees and when allowed would strip the topsoil and truck it to my farm. I did not receive any money for the topsoil.

10. When I brought the topsoil back to the property I would place it in a pile, which is now the topsoil mound, which is the location of DG-8. Since the topsoil was very sandy, it was a good source to blend with compost material from the farm, which includes manure and spent bedding. I would then run the blended material through a screener to remove oversize material that was not suitable for use as topsoil. This has been my practice for twenty years.

11. While NJDEP claims I am the source of PCB and pesticide contamination, at what I am being told are very low levels in the area of the property at the depth of 20-24 feet, since I never placed any dirt in this area and only used topsoil from virgin land the only source for the contamination in this area, if it truly exists, can be from the prior illegal dumping by Joseph Pescatore.

The issue of whether or not the contamination is from historic operations prior to Sam Russo's purchase of the property was addressed by Lawrence Brunt in his Certification as follows:

7. At Paragraph 12 of the First Supplemental Certification of Thomas Farrell (“Farrell Supp. Cert.”) Farrell states as follows: “Samples of non-native soils taken at borings DG-6 and DG-8 show that Mr. Russo has accepted contaminated soil for disposal at this property.” Based on my forty-two (42) years of experience in the environmental and engineering field, at this point Farrell does not have any evidence to support his claim Russo imported contaminated fill. The soil with the PCB contamination could very well have been brought to the farm prior to Sam Russo’s ownership.

8. The same holds true for the pesticide contamination, being Dieldrin and Aldrin. Pesticides are regularly used in farming activities. And, specifically with regard to Dieldrin and Aldrin, as Farrell states in Paragraph 14 of the Farrell Supp. Cert., Dieldrin and Aldrin ceased being used in the 1970’s and were banned completely in the 1980’s. Again, since Dieldrin and Aldrin have not been used for almost forty (40) years and the fact this property was used as a farm prior to Sam Russo’s ownership, it leads me to believe the pesticide contamination is present from historical farm operations and not from contaminated fill brought onto the property by Defendants.

9. Similarly, at Paragraphs 22 through 26 of the Farrell Supp. Cert. Farrell makes claims about Defendants’ operations being the source of arsenic found at sediment sample PS-2 and in the first page of the table attached as Exhibit B. Arsenic and the substances shown on Exhibit B are all used in pesticides. Again, given the fact this property was used as a farm prior to Sam Russo’s ownership, the arsenic and other pesticides may be as a result of historic farm operations. As

with the PCB sample results, Farrell does not have evidence to support his claim that Sam Russo's operations are the source of the arsenic and other pesticides listed in Exhibit B or that these pesticides were brought to the property in soil received by Mr. Russo.

10. And, given that in all likelihood the pesticides at the property are from historic operations under NJDEP Historically Applied Pesticides Technical Guidance, NJDEP does not require any action to be taken to address these pesticides found at the farm.

11. One further point about the arsenic is that in the sample results it showed up in only one sample location above NJDEP standards. What that says to me is that the arsenic is in all likelihood isolated to this one location and not throughout the property at levels above NJDEP residential direct contact soil remediation standards.

12. And, the same holds true for the sample results for the PCBs in two locations and Dieldrin and Aldrin in one location. Again, what this says to me is the PCBs, Dieldrin and Aldrin are in all likelihood isolated and not found throughout the property at levels above NJDEP residential direct contact soil remediation standards.

13. At Paragraph 19 of the Farrell Supp. Cert. Farrell talks about other contaminants found at the property below even residential soil remediation standards and attaches the list of contaminants at Exhibit B. What Farrell does not inform the Court is that NJDEP considers soil with contaminants below residential soil remediation standards to be considered clean fill. So, the table

with the soil results below residential soil remediation standards, some with dilution and estimated qualifiers, are irrelevant.

Based on the foregoing, the claim by NJDEP that Defendants created the PCB contamination in this area by bringing in fill dirt from “shady operators” from North Jersey and dumping it in this area is false, and at a minimum, very much in dispute. There are very real questions about whether the contamination is from historic operations, and what contamination found at the site is even actionable. Accordingly, there is no basis for NJDEP’s request for preliminary injunctive relief. Rather, the issue of the PCB and pesticide contamination and their origination need to be addressed through discovery, and if necessary, trial, but certainly not by way of this Order to Show Cause.

B. Drainage Pipe and Stream Sampling

That brings us to the stream sampling results that NJDEP also claims is a basis for the farm operations to be preliminarily enjoined and for Defendants to obtain a New Jersey Pollutant Discharge Elimination System (“NJPDES”) permit. As with many other allegations in this litigation NJDEP is acting beyond its statutory authority, as this area, being animal waste management and impact to surface waters, is regulated and policed by the New Jersey Department of Agriculture (“NJDOA”) and not NJDEP. What NJDEP is seeking to do here is regulate a non-point source discharge for which NJDEP has neither statutory nor regulatory authority, as the only authority NJDEP has is for a point-source discharge.

First, with regard to the demand Defendants obtain a NJPDES permit for their non-point source discharge, Defendants are exempt from such requirement. N.J.A.C. 7:14A-2.5(a)(4) states as follows:

7:14A-2.5 EXEMPTIONS

4. Any introduction of pollutants from nonpoint source agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands. This paragraph does not exempt the point source discharges from concentrated animal feeding operations as defined at N.J.A.C. 7:14A-1.2, from concentrated aquatic animal production facilities as defined at N.J.A.C. 7:14A-1.2, from silvicultural point sources as defined at N.J.A.C. 7:14A-1.2, or to aquaculture projects as defined at N.J.A.C. 7:14A-1.2;

With respect to the issue of a point-source discharge NJDEP will point to a pipe NJDEP claims discharges to a stream. As set forth in the Second Supplemental Certification of Sam Russo, however, NJDEP's claim the pipe discharges to the stream is an outright misrepresentation to the Court, clearly because again NJDEP wants to make their case look stronger than it actually is. The truth about this pipe, which has been at the property since before Sam Russo bought the property, is that the outfall of the pipe is approximately one hundred (100) yards from the stream. The pipe empties into a ditch, also in existence before Sam Russo bought the farm, which then goes into a floodplain area that is heavily vegetated, and any remaining runoff eventually leads to the stream.

Further, samples taken from location PS-3, also approximately one hundred (100) yards from the stream, being a drainage ditch emptying into the stream, were caused solely as a result of NJDEP's demand in the first Order on Consent the catch basins be sealed. The drainage ditch did not exist until NJDEP forced Defendants to seal the catch basins. Defendants only dug the drainage ditch for temporary use after the catch basins were closed to prevent flooding of the farm and barns on the farm. The catch basins, which are permitted by NJDOA, and which do not lead to the stream, are where stormwater discharges to as a general rule. So, but for the NJDEP's demand the catch basins be sealed there would have been no discharge from the pipe to the

stream. As Sam Russo stated in his Certification, it is damned if you do and damned if you don't.

In the sample results for the stream, being PS-2 and PS-3, NJDEP reports evidence of elevated levels of E. Coli, Fecal Coliform, Enterococci, Streptococci and Total Coliform, all of which are from animal manure. NJDEP acts shocked they would find the stream has sampling results showing contaminants from animal manure, and as a result, demands the farm operations be enjoined. This demand is specious, because every livestock farm near a waterbody will evidence the same sample results.

Further, as set forth in the Certification of Lawrence Brunt, and what NJDEP does not inform the Court, is that the contaminants from the animal manure is localized to the property and not leaving the property boundaries. Mr. Brunt states as follows:

15. At Paragraphs 15 through 18 of the First Supplemental Certification of Bryan C. Barrett ("Barrett Supp. Cert.") Barrett discusses the bacteriological sample results for water sample results PS-1 through PS-5. PS-5 represents the furthest upstream sample for what is coming onto the property and PS-1 represents the furthest downstream sample for what is leaving the property.

16. What Barrett does not inform the Court in the Barrett Supp. Cert. is that everything leaving the property is either below the surface water quality standards or below what is entering the property at PS-5, though it should also be pointed out that Streptococci and Total Coliform do not have surface water quality standards. The results are shown at Table 1 of the Barrett Supp. Cert. So, if you were to monitor what is leaving this site E-Coli Fecal Coliform, and Enterococci

are less than what is entering the site from upstream and Streptococci and Total Coliform do not have surface water quality standards.

17. The same holds true to the nutrient and solid levels shown in Table 2 of the Barrett Supp. Cert. Everything leaving the property at PS-1 is either below the surface water quality standard or what is entering the property upstream at PS-5.

18. Based on Tables 1 and 2 whatever is found in the stream is localized to the property boundaries.

Further, what NJDEP does not tell the Court is that it is NJDOA, not NJDEP, who has the statutory and regulatory authority to oversee the issue of animal wastes management. N.J.S.A. 4:9-38 states as follows:

4:9-38 Composting, handling, etc. of animal wastes.

The Department of Agriculture shall, by rule or regulation and pursuant to the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), establish criteria and standards for the composting, handling, storage, processing, utilization and disposal of animal wastes as provided in section 19 of P.L.1997, c.236 (C.4:27-19).

And, it is recognized by NJDOA that stormwater containing animal waste discharging into a water body is a problem which farms cannot eliminate, but should do their best to attempt to reduce the impact. (Second Supplemental Certification of Sam Russo, Exhibit A). That is exactly what Defendants are doing through their "Self-Certified Animal Waste Management Plan" as required pursuant to N.J.S.A. 2:91-3.4(a). (Second Supplemental Certification of Sam Russo, Exhibit B). A Self-Certified Animal Waste Management Plan is defined as "the plan developed by the farm operator utilizing the NJDOA BMP Manual for the management of

animal waste in accordance with N.J.A.C. 2:91-3.4. The plan shall be self-certified by the owner or operator and the declaration page filed with [Rutgers Cooperative Extension].”

Defendants’ Animal Waste Management Plan was prepared in conjunction with N.J.S.A. 2:91-34 and NJDOA On-Farm Strategies to Protect Water Quality, attached to the Second Supplemental Certification of Sam Russo as Exhibit A. In preparing the Animal Waste Management Plan Sam Russo originally consulted with Rutgers University Professor Michael Westendorf in 2013. Subsequently, Defendants’ second Animal Waste Management Plan was prepared in 2016 with the assistance of Jason Berkowitz, who at the time was employed with the Southern division of the Rutgers Cooperative Extension. Mr. Berkowitz is now employed by NJDOA. (Second Supplemental Certification of Sam Russo).

The 2016 Animal Waste Management Plan was reviewed by Sandra Holland of the NJDOA in 2018. The following is what Ms. Holland said about Defendants’ Animal Waste Management Plan in an e-mail to Sam Russo dated June 29, 2018:

Mr. Russo,

Thank you for your letter. Your organized and complete records made it easy to update your AWMP. The narrative descriptions you were able to provide describing each livestock area on your farm, and the Best Management Practices you are implementing at each location is a valuable document to include in your AWMP. As discussed, since your operation is continually changing, please keep the narrative descriptions up to date as part of your AWMP. [Second Supplemental Certification of Sam Russo Exhibit C].

Thus, the management of animal waste that NJDEP seeks to interfere with by way of this Order to Show Cause was specifically approved by and is overseen by the NJDOA. And, according to their request for preliminary injunctive relief, NJDEP clearly seeks to have the Court penalize Defendants for their compliance with NJDOA regulations and policies.

At page 52 of the On-Site Strategies to Protect Water Quality the NJDOA states as follows:

The following is a list of the BMPs that are recommended **to reduce or eliminate** water pollution from barnyards, manures and wastes. [Second Supplemental Certification of Sam Russo Exhibit A].

Based on the foregoing it is recognized that farms may not be able to eliminate water pollution from manure and farm waste but should utilize the Animal Waste Management Plan to attempt to reduce the pollution. That is exactly what Defendants are doing by virtue of their Animal Waste Management Plan.

The following are some of the recommendations of the NJDOA and that are currently being implemented at the farm, all of which NJDEP asks this Court to enjoin:

d. Heavy Use Area Protection(s)

Definition: installation of semi-impervious or hard impervious surfaces in heavily used areas.

Purpose: to prevent degradation and to stabilize areas intensely used by livestock, and to allow for collection, management, and utilization of animal wastes, thereby reducing migration of contaminants to surface water bodies. Grading and surfacing of heavily used areas helps protect them from erosion, trampling, rutting or other deterioration, and helps prevent the collection of pollutants.

Concrete or asphalt paving will be necessary if runoff is to be collected for treatment. Compacted gravel or other earth materials may otherwise be sufficient to stabilize the ground surface. Drainage and runoff control devices and filter strips may be components of heavy use area protection.

Initial Cost: medium - high

Maintenance Cost: low

Technical Assistance: desirable

Other Benefits:

Other Considerations:

e. Manure Composting

Definition: the process of controlled and accelerated aerobic biodegradation and stabilization of livestock manures. (See also, Agricultural Composting, under Nutrient Management)

Purpose: to prevent water contamination by biologically treating organic wastes. The by-product of this process is a safe-to-use soil amendment. Composting stabilizes nutrients and reduces pathogens, making them less likely to leach into surface or ground water. Active composting usually takes place in windrows, static aerated piles or in-vessel structures. Passive

"composting", with no active effort to manage or monitor the process, is not an effective or acceptable technique for managing organic wastes high in nitrogen. Successful composting requires careful attention to: site selection and design, selection and carbon: nitrogen ratio of ingredients, moisture, temperature, timing, proper equipment and management.

Initial Cost: medium - high

Maintenance Cost: low

Technical Assistance: required

Other Benefits: compost may be used on farm as a soil amendment/crop nutrient or sold commercially.

Other Considerations: needs careful management; there may be odor concerns; there may be regulatory considerations.

j. Sediment Basin(s)

Definition: a depression constructed to collect and store polluted runoff. Purpose: to slow runoff that may contain animal manures. The basin may be dug or constructed as an earthen embankment. It allows solids to settle before runoff is discharged.

Initial Cost: medium - high

Maintenance Cost: low

Technical Assistance: required

Other Benefits: may control erosion and sediment; may enhance nutrient management

Other Considerations: basin will need periodic cleaning or dredging.

k. Silage Leachate Waste Management

Definition: a planned system for collection, storage and disposal of silage wastes in an environmentally acceptable manner.

Purpose: to collect, store and dispose of silage leachate in a manner that minimizes threats to water resources. Silage leachate is an extremely strong organic waste, using up tremendous amounts of oxygen if released into water bodies or into the soil. The best strategy is to prevent or minimize the formation of silage leachate and to safely store and dispose of if any generated. Proper siting and sizing of silage facilities is the first step. Practices such as harvesting the silage at a moisture content that will not result in excessive silage leachate production, covering the silage pile to eliminate rain infiltration, and installing drains and/or diversions to separate ground water and surface water runoff from the ensiled forage are also important. A properly designed waste collection and storage system may combine silage leachate with other agricultural wastes. Leachate may be land applied, alone in diluted form, or mixed with manure or other wastes according to a waste utilization plan and a nutrient management plan, paying particular attention to application rates.

Initial Cost: high

Maintenance Cost: medium - high

Technical Assistance: required

Other Benefits: may have nutrient value as soil amendment

Other Considerations: federal cost share may be available. [Second Supplemental Certification of Sam Russo Exhibit A].

The above are some of the animal waste management practices currently being employed at the farm. Yet, it is exactly these practices NJDEP seeks to enjoin by way of this Order to Show Cause.

As noted above, this Order to Show Cause has morphed from the frivolous claims about Defendants operating an "unpermitted commercial scale solid waste facility" to a dispute about historic contamination, and farm practices implemented in accordance with NJDOA regulations and policies. The issue of historic contamination and farm practices is clearly in dispute and certainly is not an appropriate subject for this Order to Show Cause seeking to enjoin those practices.

CONCLUSION

While set forth in its prior submissions to the Court the following bears repeating. NJDEP's request for the issuance of preliminary injunctive relief must fail inasmuch as NJDEP cannot meet the long established standard for the issuance of preliminary injunctive relief as set forth by the Supreme Court of New Jersey in Crowe v. DeGioia, 90 N.J. 126, 132-35 (1982) as follows:

To the contrary, New Jersey has long recognized, in a wide variety of contexts, the power of the judiciary to "prevent some threatening, irreparable mischief, which should be averted until opportunity is afforded for a full and deliberate investigation of the case." Thompson, Attorney General v. Paterson, 9 N.J. Eq. 624, 625 (E. & A. 1854). **We recognize that the determination to authorize preliminary relief summons the most sensitive exercise of judicial discretion. In exercising that discretion, courts have been guided traditionally by certain fundamental principles.**

One principle is that a preliminary injunction should not issue except when necessary to prevent irreparable harm. Citizens Coach Co. v. Camden Horse R.R. Co., 29 N.J. Eq. 299, 303 (E. & A. 1878). Harm is generally considered irreparable in equity if it cannot be redressed adequately by monetary damages. In certain circumstances, severe personal inconvenience can constitute irreparable injury justifying issuance of injunctive relief. Hodge v. Giese, 43 N.J. Eq. 342, 350 (Ch. 1887) (one tenant temporarily granted right to enter other tenant's premises to service heater). Pecuniary damages may be inadequate because of the nature of the injury or of the right affected. Outdoor Sports Corp. v. A.F. of L. Local 23132, AFL, 6 N.J. 217, 229-30 (1951); Scherman v. Stern, 93 N.J. Eq. 626,

631 (E. & A. 1922) (seller of business temporarily ordered to abide by agreement not to compete). In this case, Crowe was threatened with the loss of her home of 14 years and her only means of support. The interest of an unmarried cohabitant in enforcement of a support agreement and the trauma of eviction from one's home may well justify the intervention of equity. Neither an unwarranted eviction nor reduction to poverty can be compensated adequately by monetary damages awarded after a distant plenary hearing.

A second principle is that temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled. Citizens Coach Co. v. Camden Horse R.R. Co., *supra*, 29 N.J. Eq. at 304-05. Here, however, the underlying legal claim, the enforceability of a support agreement between unmarried cohabitants, was settled as a matter of law in Kozłowski v. Kozłowski, *supra*.

A third rule is that a preliminary injunction should not issue where all material facts are controverted. Citizens Coach Co. v. Camden Horse R.R. Co., *supra*, 29 N.J. Eq. at 305-06. Thus, to prevail on an application for temporary relief, a plaintiff must make a preliminary showing of a reasonable probability of ultimate success on the merits. Ideal Laundry Co. v. Gugliemone, 107 N.J. Eq. 108, 115-16 (E. & A. 1930). That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to maintain the *status quo*. See Naylor v. Harkins, 11 N.J. 435 (1953) (international union temporarily restrained from reporting members of expelled local to employers under union shop contracts); Haines v. Burlington County Bridge Comm'n, 1 N.J. Super. 163, 175 (App.Div. 1949) (temporarily restraining county's efforts to acquire bridges). Indeed, the point of temporary relief is to maintain the parties in substantially the same condition "when the final decree is entered as they were when the litigation began." Peters v. Public Service Corp. of N.J., 132 N.J. Eq. 500 (Ch. 1942), *aff'd o.b.*, 133 N.J. Eq. 283 (E. & A. 1943) (bus company enjoined from proceeding with motion to dismiss suit when statute of limitations barred new action)...

The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief. Isolantite Inc. v. United Elect. Radio & Mach. Workers, 130 N.J. Eq. 506, 515 (Ch. 1941), *mod. on other grounds*, 132 N.J. Eq. 613 (E. & A. 1942). DeGioia, apparently now a person of substantial means, would suffer relatively inconsequential expense if relief is granted. By contrast, withholding support from Crowe would be devastating. On balance, the equities favor the grant of temporary relief to maintain the *status quo* pending the outcome of a final hearing... **Nonetheless, the relief granted should be no broader than necessary to preserve the *status quo* pending a plenary hearing on the merits.**

(emphasis added).

Based on the foregoing NJDEP must satisfy four (4) prongs for a preliminary injunction to issue. While NJDEP's claims were weak when NJDEP filed its initial papers their claims have gotten weaker with the test pits, soil borings, and sampling results, as NJDEP's claims have been shown to be demonstrably false. After the sampling results NJDEP cannot even satisfy one (1) prong of the test under Crowe v. DeGioia.

1. A preliminary injunction should not issue except when necessary to prevent irreparable harm. Based on the supplemental filings following the sampling results there is not a single indicia of irreparable harm as nothing of substance was found, factually or legally, to support a claim of irreparable harm. Out of 1,242 soil analyses 1,237 were either not detected or were below the most stringent soil remediation standards. And, of the five contaminants detected, only one sample was above the nonresidential soil remediation standard, which is the appropriate standard for the farm. Further, with respect to bacteriological sample results, as pointed out in the Certification of Lawrence Brunt, the bacteria is localized to the property.

2. Temporary relief should be withheld when the legal right underlying plaintiff's claim is unsettled. In this instance the legal rights underlying NJDEP's claims are not only clearly unsettled, they are settled in favor of Defendants, as NJDEP lacks legal authority to regulate any of the activities complained of as solid waste or animal waste management.

3. A preliminary injunction should not issue where all material facts are controverted. There is no question all of the material facts are controverted.

4. The final test in considering the granting of a preliminary injunction is the relative hardship to the parties in granting or denying relief. In this instance there can be no dispute that if the relief is granted Defendants will suffer the greatest hardship, as the effect will be to shut down the farm operations, including, but not limited to, the ability to feed one hundred sixty

(160) head of cattle and one hundred (100) pigs. On the other hand, if the relief is denied there is no hardship to NJDEP as there is no harm to anything established by NJDEP.

Based on the foregoing and the prior opposition to the OTSC Defendants respectfully submit NJDEP's request for preliminary injunctive relief should be denied in its entirety and this matter should be permitted to proceed through the normal environmental case management track, being four hundred fifty (450) days.

Respectfully submitted,

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